APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed March 23, 1982]

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG AND CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,	)	No. 80-1944
Plaintiffs-Appellants,	)	
v.	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER & GLEN RINEHART, as agents and attorneys,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the Northern District of Oklahoma
D.C. No. 79-C-629

Submitted on the briefs:

Glenn O. Young, Sapulpa, Oklahoma, Attorney for Plaintiffs-Appellants.

Elsie Cox Draper, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, Tulsa, Oklahoma, for the Defendants-Appellees.

[APPENDIX]

Before PICKETT, McWILLIAMS and DOYLE

PICKETT, Circuit Judge

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). This cause is therefore ordered submitted without oral argument.

On September 16, 1974, Thomas Alexander Young completed an application for a $20,000.00 double indemnity life insurance policy from Fidelity Union Life Insurance Company, a Texas corporation. The primary beneficiaries were Charlotte Meier Young and Glenn O. Young, mother and father of the insured. Ulrich Waldemar Young and Norbert Nelson Young, minor brothers of the insured, were contingent beneficiaries. The application provided that the premiums would be paid in monthly installments of $30.05. The first monthly installment was paid with the application. The second monthly installment was paid by the insured's mother. No more premiums were paid. The policy was issued on September 18, 1974 and sent to the writing agent who inquired of the insured as to delivery. On December 16, 1974, the policy was sent to the Kansas home of the insured and actually received by him on December 22, 1974. The insured was killed on February 14, 1975. The insurance company denied liability asserting that the policy had lapsed because of non-payment of premiums.

Charlotte Meier Young, as a primary beneficiary, and assignee of Glenn O. Young, in trust for the two younger sons, brought an action in the Creek County, Oklahoma state court, to recover the proceeds of the policy. The insurance company employed the Tulsa, Oklahoma law firm of Gable, Gotwals, Rubin, Fox, Johnson and Baker to represent it in the pending litigation. James M. Sturdivant,

a member of the law firm, was assigned to the case which was removed to the U.S. District Court for the Northern District of Oklahoma. A motion for summary judgment was filed for the insurance company alleging that the policy was not in effect at the date of the death of the insured. Before the disposition of this motion, Glenn O. Young, in his own behalf, as administrator of the estate of his son, Thomas, and as next friend of his two minor sons, moved to intervene in the case. The trial court denied this motion stating that Glenn O. Young had assigned his interest in the policy to his wife, Charlotte, and had no interest therein. The court also held that interests of the minor sons, if any, was represented by their mother, Charlotte, and that the estate of the deceased son had no interest in the litigation. No appeal was taken to the court's denial of this motion.

In the pretrial proceedings, recognizing that only two monthly premiums had been paid, the critical issue was whether the policy became effective on the date of the acceptance of the application or the date that the policy was manually delivered to the insured. This issue was determined on motion for summary judgment filed by the parties. The trial court, following a hearing on these motions, concluded that the unambiguous terms of the application and the policy fixed the effective date as September 16, 1974 and that on the date of the insured's death, it had lapsed for non-payment of premiums. This court affirmed Young v. Fidelity Union Life Insurance Company, 597 F.2d 705 (10th Cir. 1979) in which the court stated:

> Based on the undisputed facts, the effective date of the insurance policy was September 16, 1974, and as only two monthly premiums were paid, the policy by its terms had lapsed when the insured met his untimely death on February 14, 1975. The trial court, under the circumstances, did not err in granting judgment for Fidelity Union.

After the judgment in the first action became final, Glenn O. Young, in person and as administrator of the estate of Thomas Alexander Young, also as father and next friend of his two younger sons, together with his wife, Charlotte, brought this action in the District Court of Creek County, Oklahoma to recover on the same policy which was the subject of the first action.[1] In addition to the insurance company, the attorneys who represented the company in the first action, together with Glen Rinehart, as a policy writing agent for the company, were made defendants. The case was removed to the U.S. District Court for the Northern District of Oklahoma alleging that the inclusion of the attorneys as defendants was a fraudulent joinder for the purpose of defeating Federal jurisdiction. No service was had on the defendant Rinehart and the court dismissed as to him for lack of prosecution. Following a hearing, the court found that no cause of action existed against the attorneys and sustained their motion for summary judgment. The court then denied plaintiffs' motion to remand. It also sustained insurance company's motion for summary judgment holding that the issues had been determined in the former litigation which was binding on the plaintiffs. On application the court allowed attorney fees to the defendants as court costs.

The issues presented by this appeal are whether the trial court erred: (1) in sustaining the attorney's motion for summary judgment and denying plaintiffs' motion to remand; (2) sustaining defendant's motion for summary judgment on the basis of *res judicata;* and (3) allowance of attorney fees to the defendants.

In removal proceedings, when a question arises as to a fraudulent joinder of a resident defendant, the trial court

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[1] Glenn O. Young was a practicing attorney in the City of Sapulpa, Oklahoma. In this action he appeared pro se and as attorney for the other plaintiffs. In the first case he did not appear as an attorney of record because he expected to be a witness.

is not bound by the allegations in plaintiff's pleadings but may resort to other means to determine if a cause of action exists as to that defendant. Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (10th Cir. 1964); Wilson v. Republic Iron & Steel Company et al, 257 U.S. 92 (1921); Smoot v. Chicago, Rock Island and Pacific Railroad Company, 378 F.2d 879 (10th Cir. 1967).

There is a suggestion in the vague allegations of the pleadings, the extensive arguments at the hearing on the motion for summary judgment and the briefs filed in this court that the insurance company and its attorneys joined in a sinister scheme or plot to fraudulently mislead the District Court and this court in finding against them in the first case on the simple issue of the effective date of the policy. The record in the first and in this case is completely devoid of any indication of misconduct on the part of the attorneys for the insurance company. The inclusion of them as defendants is an obvious sham and frivolous. The court did not err in sustaining the motion for summary judgment and overruling the motion to remand.

It is next urged that the trial court erred in sustaining the insurance company's motion for summary judgment for the reason that the plaintiffs were bound by a final judgment in a former case. *Res judicata* means that a matter has been previously settled by a final judgment. (Black's Law Dictionary; 46 Am. Jur. 2d Judgments §395, p. 559).

The doctrine is firmly established in the law. It is in the nature of an estoppel, the purpose of which is designed to put an end to litigation of claims which have been previously determined by final judgment. It bars all parties and their privies from recovery on matters which have been duly adjudicated or should have been adjudicated in prior litigation. In Guarantee Acceptance Corporation v. Fidelity Mortgage Investors, 544 F.2d 449 (10th Cir. 1976), this court stated:

> Under the doctrine of res judicata, a prior adjudication between the parties or their privies on the same

cause of action is conclusive as to all matters which are, were or should have been litigated. Spence v. Latting, 512 F.2d 93 (10th Cir. 1975) *cert. denied*, 423 U.S. 896.

In Brown v. Felson, 442 U.S. 127, the court said:

> Res judicata ensures the finality of decisions. Under res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979). Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings. Chicott County Drainage Dist v. Baxter State Bank, 308 U.S. 371, 378 (1940); 1B J. Moore, Federal Practice ¶0.405 [1] (2d ed. 1974). Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

See also Katzburg v. Krebs et al., 545 F.2d 104 (10th Cir. 1976); *Spence* v. *Latting*, 512 F.2d 93 (10th Cir. 1975) *cert. denied*, 423 U.S. 896.

We need not determine whether this action can be maintained as a collateral attack upon the former judgment as the plaintiffs cannot prevail in any event. The gist of the allegations in the complaint and the arguments in their support appears to be that the representative of the insurance company and their agents, after the death of the insured, entered into some kind of a sinister plot or conspiracy to prevent those entitled to the policy proceeds from proving their right and to mislead the trial court and this court into not accepting their interpretation of the policy provisions. These allegations, if they were material in respect in determining liability on the policy, could have been presented in the first case. The policy provisions

determine the rights and obligations of the parties. The Youngs can prevail only if the policy is in effect on the date of the death of the insured. This was the issue which was fully considered by the trial court and by this court in the first action. The final judgment was contrary to the contentions of the Youngs and they cannot be relitigated.

Relying on Oklahoma statute, Title 36 O.S. §3629(B),[2] the insurance company sought an allowance for attorney fees in the action. In support of this motion, the insurance company submitted an itemized statement of the services rendered and the amounts charged therefor. A knowledgeable practicing attorney in the Tulsa, Oklahoma area testified that the value of the services rendered was substantially more than those contained in the statement. The Youngs did not contest the right to an allowance for attorney fees and offered no evidence as to their value. The court allowed the claim in the amount of $5,165.00. There was ample evidence to support the reasonableness of this award.

AFFIRMED.

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[2] Title 36 O.S. §3629(b) reads: It shall be the duty of the insurer receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a *judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party.* For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party. This provision shall not apply to uninsured motorist coverage. 36 O.S. 3629(B) (1977 Supp.)

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM — April 22, 1982

Before Honorable Robert H. McWilliams, Honorable William E. Doyle, and Honorable John C. Pickett, Circuit Judges

ULRICH WALDEMAR YOUNG, a Minor, NORBERT NELSON YOUNG, and CHARLOTTE MARIE YOUNG, and GLENN O. YOUNG in person and as the Administrator of the Estate of Thomas Alexander Young, and Father and Next Friend of Ulrich Waldemar Young and Norbert Nelson Young, Plaintiffs-Appellants,	)	No. 80-1944
vs	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, as Agents and Attorneys, Defendants-Appellees.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed August 8, 1980]

ULRICH WALDEMAR YOUNG, a minor, et al.,	)	
Plaintiffs,	)	
vs.	)	79-C-629-BT
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, et al.,	)	
Defendants.	)	

ORDER

It having come to the Court's attention a scrivener's error was made in the Order and Judgment heretofore entered in this case on July 29, 1980, in that the amount of Judgment to be awarded was reflected as $3,651.25, when it should have been $5,165.00,

IT IS ORDERED the Order entered July 29, 1980, and the Judgment entered July 29, 1980, be amended to show the correct amount of $5,165.00 instead of $3,651.25.

ENTERED this 5th day of August, 1980.

(s) *Thomas R. Brett*

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed July 29, 1980]

ULRICH WALDEMAR YOUNG, a minor, et al., Plaintiffs,	)	
vs.	)	79-C-629-BT
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, et al., Defendants.	)	

ORDER

This matter came on for hearing before the undersigned Judge on July 2, 1980, on the Motion for New Trial and for Rehearing filed by plaintiffs; hearing on the Counterclaim of the defendant, Fidelity Union Life Insurance Company. At the conclusion of the arguments and evidence the Court took the matters under advisement.

The Court has reviewed the Motion for New Trial and for Rehearing filed by plaintiffs; has considered the ent're file, including the additional authorities presented by plaintiffs in their Motion to Include and Cite Additional Authorities at Oral Argument on Motion for New Trial; the briefs filed by the parties; the oral argument of the parties.

The Court is not persuaded by plaintiffs's arguments that the previous order entered on June 3, 1980, is incorrect. The Court, therefore, finds plaintiffs' Motion for New Trial and for Rehearing should be overruled.

In the Order entered June 3, 1980, the Court made the following finding relevant to the counterclaim of Fidelity Union Life Insurance Company: "This order is not dispositive of the Counterclaim and it will be set for hearing."

Fidelity Union Life Insurance Company seeks to recover attorney fees pursuant to 36 O.S. §3629(B) (1977 Supp.) which provides, in pertinent part:

> "It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon judgment rendered to either party, costs and attorney fees shall be allowed to the prevailing party."

Case 76-C-30-C, styled "Charlotte Meier Young, etc., Plaintiff, vs. Fidelity Union Life Insurance Company, Defendant", decided by the Honorable H. Dale Cook, and affirmed by the Tenth Circuit Court of Appeals in *Young* v. *Fidelity U. Life Ins. Co.*, 597 F.2d 705 (10th Cir. 1979), was filed prior to the enactment of 36 O.S. §3629(B) (1977 Supp.) and Fidelity claimed no attorney fees in that case, nor was Fidelity entitled to claim attorney fees in that case.

Fidelity Union Life Insurance Company contends it is entitled to recover attorney fees and costs in this action as the prevailing party.

The evidence and exhibits in the present case (attached to the Answer of Fidelity Union Life Insurance Company) reveal plaintiffs made an oral demand for the benefits they claimed on March 6, 1975; a written demand on March 12, 1975; filed a Casualty Report and Proof of Death Claim on March 19, 1975. The evidence further shows Fidelity Union Life Insurance Company denied in writing the benefits on March 6 and April 18, 1975. The Court finds this correspondence sufficient to bring the defendant insurance company within the confines of 36 O.S. §3629(B) (1977 Supp.) and entitle it to claim attorney fees and costs.

At the hearing, Fidelity Union Life Insurance Company filed an Affidavit in open Court, with an exhibit attached, which revealed the claim of the insurance company

for legal fees as follows: 79.75 hours at $45.00 per hour — $3,588.75; 1.25 hours at $50.00 per hour — $62.50; total claim — $3,651.25.

Fidelity Union Life Insurance Company also called as a witness Mr. David Fist, a member of the bar of this Court, who after being duly sworn and qualified, testified as to the reasonableness of the fees sought by the insurance company. Mr. Fist testified in his opinion the claimed attorney fees were low and modest and certainly reasonable.

The Court, upon reviewing the entire record and the evidence adduced, finds the attorney fees sought in the amount of $3,651.25 are reasonable.

The Court finds Fidelity Union Life Insurance Company is entitled to recover attorney fees in the sum of $3,651.25 pursuant to 36 O.S. §3629(B) (1977 Supp.) and is entitled to have judgment rendered in that amount on its counterclaim.

IT IS THEREFORE, ORDERED as follows:

1. Plaintiffs' Motion for New Trial and Motion to Reconsider be overruled.

2. Defendant, Fidelity Union Life Insurance Company is entitled to recover attorney fees in the amount of $3,651.25 on its counterclaim and have judgment entered in its favor and against Charlotte Marie Young; Glenn O. Young, as the Administrator of the Estate of Thomas Alexander Young; and Glenn O. Young, as Father and Next Friend of Ulrich Waldemar Young and Norbert Nelson Young.

ENTERED this 29 day of July, 1980.

(s) *Thomas R. Brett*
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed July 29, 1980]

ULRICH WALDEMAR YOUNG, a minor, et al.,	)	
Plaintiffs,	)	
vs.	)	79-C-629-BT
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, et al.,	)	
Defendants.	)	

JUDGMENT

Pursuant to the Order entered simultaneously with this Judgment, IT IS ORDERED Judgment be entered in favor of the defendant, Fidelity Union Life Insurance Company, and against Charlotte Marie Young; Glenn O. Young, as the Administrator of the Estate of Thomas Alexander Young; and Glenn O. Young, as Father and Next Friend of Ulrich Waldemar Young and Norbert Nelson Young, in the amount of $3,651.25.

ENTERED this 29 day of July, 1980.

(s) *Thomas R. Brett*
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE DISTRICT COURT IN AND FOR
CREEK COUNTY, SAPULPA DIVISION,
STATE OF OKLAHOMA

ULRICH WALDEMAN YOUNG, a Minor, NORBERT NELSON YOUNG, and CHARLOTTE MARIE YOUNG, and GLENN O. YOUNG in person and as the Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,	)	
Plaintiffs,	)	No. C-79-301
vs.	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, as Agents and Attorneys,	)	
Defendants.	)	

REMOVAL PETITION AND REMOVAL BOND

COME NOW the defendants, the Fidelity Union Life Insurance Company, James M. Sturdivant, and Gable, Gotwals, Rubin, Fox, Johnson & Baker, and file herewith the Removal Petition and Removal Bond filed in the United States District Court for the Northern District of Oklahoma, on October 5, 1979, styled as above.

(s) *Elsie Draper*
GABLE, GOTWALS, RUBIN, FOX,
JOHNSON & BAKER
20th Floor, Fourth National Bldg.
Tulsa, Oklahoma 74119
918/582-9201

Attorneys for Defendants

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed January 30, 1976]

CHARLOTTE MEIER YOUNG, in person and as Assignee in trust for her minor sons, Norbert Nelson and Ulrich Waldemar Young, Plaintiff as Respondent,	)	
vs.	)	No. 76-C-30
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, Defendant as Petitioner,	)	

PETITION FOR REMOVAL

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Comes now the Defendant, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, and for its petition for removal respectfully shows:

1. On January 13, 1976, an action was commenced against petitioner, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, in the District Court of Creek County, Oklahoma, entitled "Charlotte Meier Young, in person and as Assignee in trust for her minor sons, Norbert Nelson and Ulrich Waldemar Young, Plaintiff, v. Fidelity Union Life Insurance Company, a stock company, Dallas, Texas, Defendant", being Cause No. C-76-14 in said Court. Thereafter, the Plaintiff in said action caused to be issued a summons out of the District Court of Creek County, Oklahoma, which summons and a copy of the Plaintiff's complaint were served upon The Honorable Gerald Grimes, State Insurance Commissioner for the State

of Oklahoma, as statutory service agent for FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, on January 14, 1976, requiring answer on or before February 12, 1976. Thereafter, said summons and complaint were forwarded by The Honorable Gerald Grimes, State Insurance Commissioner, to FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, same being received on January 16, 1976. Full, true, and correct copies of the complaint, summons, and letter of transmittal from the State Insurance Commissioner to FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, are hereto attached, which constitute all of the pleadings, process, and orders served upon petitioner in such action.

2. The above described action is one of which this court has original jurisdiction under the provisions of Title 28, United States Code, Section 1332, and is one which may be removed to this court by petitioner, Defendant herein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action wherein the matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000), exclusive of interest and costs, and is between citizens and residents of different states. At the time this action was commenced, the Plaintiff was and still is a citizen and resident of the City of Sapulpa, Creek County, State of Oklahoma, and the Defendant, at the time of commencement of this action, was and still is a stock company organized under the Texas Laws, with its principal office and place of business located at Dallas, Texas, by reason whereof there is a complete diversity of citizenship between Plaintiff and Defendant in said action.

3. Petitioner herewith files a bond with good and sufficient surety conditioned, as provided by Title 28, United States Code, Section 1446(d) that it will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the case was not removable or was improperly removed.

WHEREFORE, petitioner, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, respectfully prays that the above action now pending against it in the District Court of Creek County, Oklahoma, be removed therefrom to this court.

(s) *Jim M. Sturdivant*
James M. Sturdivant for

GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER
2010 Fourth National Bank Bldg.
Tulsa, Oklahoma
(918) 582-9201

Attorneys for Defendant and Petitioner,
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company

STATE OF OKLAHOMA)(
)(ss.
COUNTY OF TULSA)(

James M. Sturdivant, of lawful age, being first duly sworn on oath states:

That he is the attorney for the Defendant, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, petitioner herein, and makes this affidavit for the reason that the Defendant is not a resident of Tulsa County and is absent therefrom; that affiant has read the foregoing Petition for Removal, is familiar with the contents thereof,

and believes that the facts therein set forth are true and correct.

(s) *Jim M. Sturdivant*
James M. Sturdivant

Subscribed and sworn to before me this *30th* day of *January*, 1976.

(s) *Dorothy A. Balis*
Notary Public

My Commission Expires:
6-24-79

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed November 6, 1979]

ULRICH WALDEMAR YOUNG, a Minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, IN PERSON AND AS THE ADMINISTRATOR OF THE ESTATE OF THOMAS ALEXANDER YOUNG AND FATHER AND NEXT FRIEND OF ULRICH WALDEMAR YOUNG AND NORBERT NELSON YOUNG,	Plaintiffs,	No. 79-C-629-C
vs.		
FIDELITY UNION INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, AS AGENT AND ATTORNEYS,	Defendants.	

PLAINTIFFS WITHDRAWAL OF DISMISSAL AND MOTION TO REMAND

Responding to minute order of the Honorable H. Dale Cook, U. S. District Judge, entered under date of October 24, 1979, plaintiffs confess and agree to defendants' Motion to Strike Dismissal and in lieu thereof move to remand this cause to the District Court of Creek County, from which the same was unlawfully and illegally removed in violation of the laws and statutes of the United States. (See 28 U.S.C. 1441.)

(s) *Glenn O. Young*
Glenn O. Young, pro se
and Attorney for Plaintiffs.

APPENDIX I

[Page 3 of Brief of Appellants' in the United States Court of Appeals Tenth Circuit, Dated November, 1980]

* * *. In event plaintiffs contentions that the Court erred in overruling their Motion to Remand is sustained, consideration of all other issues will, of course, be irrelevant since if issued without jurisdiction, such determinations are without binding force or effect and need not be here further considered or adjudicated save by an order to vacate for want of jurisdiction.

POINTS AND ISSUES

I

There was an absence of federal jurisdiction in the U. S. District Court for the Northern District of Oklahoma, and for said reason, the trial judge erred in summarily overuling and denying Appellants' Motion to Remand.

II

Said judgment advanced as *res judicata* is void upon the face of the record for want of federal jurisdiction to render the same.

III

The Trial Court erred in granting Summary Judgment dismissing plaintiffs' claims against defendant attorneys, fees claimed in favor of Fidelity on its Cross-Petition.

A.

For want of jurisdiction of any Cross-Petition or Motion to Dismiss.

B.

For failure of evidence to show that attorneys fees allowed Fidelity were just, due and unpaid.

C.

The amount allowed was so excessive as to constitute evidence of bias and prejudice.

IV

The Trial Court erred in finding plaintiffs' evidence insufficient under the laws of Oklahoma to state a cause of action for fraud and deceit.

A.

The Trial Court disregarded law on fraud.

B.

An insurance company may not demand and collect premiums on a policy of insurance for a period during which it assumes no risks. The delivery of the policy was pre-requisite to its effectiveness and therefore the date from which premiums were earned and due.